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FOLTZ v. CONRAD REALTY CO.

Nov. 21, 1921.

[109 S. E. 463.]

1. Judgment (§ 184*)—Essentials of Notice in Proceeding by Motion Stated.—Great informality is allowed in proceeding by motion for judgment, and the notice need only give the opposing party a sufficient idea of the grounds of action relied on and state a good cause of action with requisite certainty.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 128.]

2. Judgment (§ 184*)—Notice of Motion Need State Only Legal Effect of Part of Contract Relied on.—Notice of motion for judgment need not set out the contract relied on, but only the substance and legal effect of so much of it as is required for statement of plaintiff's case.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 128.]

3. Contracts (§ 324 (2)*)—Recovery Sought for Misconduct Rendering Complete Performance Impossible Is One Growing Out of Contract.—Recovery of damages sought for defendant's misconduct rendering impossible complete performance by plaintiff of his contract with defendant for performance of which plaintiff was to receive certain payments is a recovery growing out of the contract.

4. Brokers (§ 40*)—Paragraphs of Contract Not Inconsistent as to Commissions.—Two paragraphs of a contract between broker and owner of lots as to commissions held not inconsistent; one being applicable if all the lots are sold by the broker; the other where part are sold by the owner.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 638 et seq.]

5. Contracts (§ 143*)—To Be Construed as a Whole.—In construing a written contract the entire instrument is to be considered.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 401.]

6. Brokers (§ 87*)—Amount of Recovery under Contract Where after Sales of Part of Lots Owner Refuses to Complete Them Stated.—Where contract between lot owner and broker places a price on each lot, the sum aggregating \$5,000 and agrees to pay the broker as commission the amount obtained in excess of that sum, and provides that, if any lots remain at the close of the sale, the owner will take them back at the price placed on them, the broker having made contracts of sales of over a third of them, each for more than the price fixed, and not being in fault, and being wrongfully prevented by the owner from completing the sales, is entitled to recover of the owner an amount

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

equal to the excess of the prices in the contracts of sale over the prices fixed by the owner.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 638 et seq.]

7. Evidence (§ 448*)—Conversations of Parties before Executing Contract as to Its Meaning Not Admissible.—A written contract may not be varied by evidence of conversation between the parties before its execution as to its meaning.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 646 et seq.]

8. Brokers (§ 63 (1)*)—Generally Entitled to Commissions Where Sale Negotiated by Him Fails through Owner's Fault.—Generally a broker is entitled to commissions where a sale negotiated by him in conformity to the agreement falls through by fault of the owner only.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 638 et seq.]

9. Brokers (§ 61 (4)*)—Owner Not Relieved of Liability for Commissions because of Defect in Title Not Known by Broker.—That the owner's reason for refusal to complete sales negotiated by a broker, by giving the stipulated good warranty deed—that is, one with general warranty—is that he had discovered his title to be defective, being a special warranty deed only, does not relieve him of liability for commissions, provided the broker proceeded in good faith to secure purchasers, not knowing of the defect when he contracted with the owner or when he performed the work.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 638 et seq.]

10. Brokers (§ 61 (4)*)—Not Entitled to Commissions Where Not Telling Customers of Information of Defect in Title unless Showing Title Good.—Where a broker, employed to sell building lots into which his principal's tract was divided, was before doing any work told by a reputable lawyer whom he had consulted, that the deed to his principal omitted parts of the tract, he was put on notice, which he was bound to communicate to prospective purchasers, and not having done so, he could not recover commissions, though he made contracts of sale, unless he showed the title was good; the principal having refused to give a general warranty deed on discovery that his deed contained only a special warranty.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 638 et seq.]

Error to Circuit Court, Page County.

Proceeding by motion for judgment by the Conrad Realty

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Company against R. P. Foltz. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Will A. Cook, of Madison, and *H. V. Strayer*, of Luray, for plaintiff in error.

John H. Downing, of Front Royal, and *Wm. F. Keyser*, of Luray, for defendant in error.

BAILEY v. HINES, Director General of Railroads.

Nov. 17, 1921.

[109 S. E. 470.]

1. **United States (§ 125*)—Action against Director General of Railroads against Railroads under Federal Control Is in Effect a Suit to Which the United States Is a Party.**—An action against a Director General of Railroads and his successor in office, as agent designated by the President against whom suits against railroads should be brought is, in substance and effect, a suit against the United States.

2. **United States (§ 125*)—Conditions Prescribed by Government for Bringing Suit against It Must Be Complied with.**—Federal government had power to deny the right of suing it for acts growing out of its management of railroads or to prescribe terms and conditions for such suits, and when so prescribed they must be complied with.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 406.]

3. **Railroads (§ 5½*)—New, vol. 6A Key-No. Series—Director General Suable without Naming Him.**—Under General Order No. 50A, issued by the Director General of Railroads concerning suits against railroads, an action against the Director General of Railroads in his official capacity may be directed against the Director General of Railroads without naming him personally.

4. **Railroads (§ 5½*)—New, vol. 6A Key-No. Series—Federal Agent Appointed under Transportation Act Suable without Naming Him.**—In a suit to subject to plaintiff's claim the revolving fund set apart by the government for that purpose, the designation of the defendant as Director General of Railroads and his successor in office as the agent provided for in section 206 of the Transportation Act Cong. Feb. 28, 1920 and designated under the proclamation of the President of the United States, is a sufficient designation, and the name of the incumbent of the office may be properly omitted or, if deserted, stricken out.

5. **Railroads (§ 5½*)—New, vol. 6A Key-No. Series—Procedure Not Affected by Federal Control.**—The Federal Control Act Cong.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.